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COURT OF CRIMINAL APPEALS
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PD-0790-17

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
9/6/2017
DEANA WILLIAMSON, CLERK

KEITHRICK THOMAS
Appellant

vs.

THE STATE OF TEXAS
Appellee

ON DISCRETIONARY REVIEW FROM
THE FOURTEENTH COURT OF APPEALS - HOUSTON
No. 14-16-00230-CR

and on

APPEAL FROM
THE 230th DISTRICT COURT -OF HARRIS COUNTY, TEXAS
Cause No. 1454620

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant Keithrick Thomas brings this Petition for Discretionary Review and would respectfully show the following:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested, because this case involves an important question about warrantless searches and seizures and Appellant Thomas believes oral argument would assist this Court in its decision.

STATEMENT OF THE CASE

Appellant Thomas was indicted for Possession of a Controlled Substance. Appellant Thomas filed a Motion to Suppress. The trial court denied the Motion to Suppress. After the Motion to Suppress was denied, Appellant Thomas entered a plea of guilty and was sentenced to two (2) years. The Court of Appeals affirmed the trial court's judgment, holding that the search of Appellant was not unreasonable and the seizure of the controlled substance was not illegal. This petition requests an examination of that holding.

STATEMENT OF PROCEDURAL HISTORY

On June 8, 2017, the Fourteenth Court of Appeals issued an opinion that was not designated for publication, affirming the trial court's judgment. A motion for rehearing was not filed.

Ground for Review

1. Has a Fourth Amendment violation occurred, where a police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house? [RR, 10-11][1]

Argument

The Court of Appeals issued a decision in Appellant Thomas' case that conflicts with opinions of The Court of Criminal Appeals. The decision makes proper protocol related to warrantless search and seizure exceptions unclear to the bench, the bar and law enforcement. The Court of Appeals accepted the following facts as true: Houston Police Officer Elizabeth Gemmill was assigned to a tactical unit, charged with monitoring "a known narcotics house that in the past was known to distribute narcotics". Officer Rohan Walker, who was also a part of the tactical unit, radioed Officer Gemmill and her partner Officer Gilcrest and informed the officers that a car had left the residence and told Officers Gemmill and Gilcrest to "get the P[robable] C[ause] and stop the vehicle." The officers observed the vehicle fail to signal a right turn. They caught up to the car "as it came to a stop in

[1] 'RR' refers to the single volume reporter's record, with page number(s) following.

front of a house and initiated a traffic stop". The house was Appellant's residence, but Officer Gemmill was unaware of that fact. Appellant exited the vehicle and started walking in the driveway towards his residence. Officer Gemmill detained Appellant Thomas by handcuffing him. Officer Gemmill frisked Appellant Thomas after Appellant Thomas was handcuffed. While Officer Gemmill was handcuffing Appellant Thomas, Officer Gemmill could see the top of a pill bottle and a little bit of the orange in "plain view". Officer Gemmill removed the pill bottle from Appellant Thomas' pocket and "saw that it did not have defendant's name on it and it had Xanax tablets inside of it". After finding that bottle, Officer Gemmill conducted a full search and found another pill bottle with crack cocaine inside of it in Appellant's front right pant pocket.

The Court of Appeals relied on Josey v. State, 981 S.W. 2d 831 (1998) and Arizona v. Johnson, 555 U.S. 323 (2009) and concluded that Appellant Thomas was a passenger in a vehicle lawfully detained for a traffic violation and that Officer Gemmill was justified in detaining Appellant Thomas for investigative purposes. It is questionable whether Josey and Johnson are applicable here. Both Josey and Johnson were passengers in vehicles. In this case, it is undisputed that Appellant Thomas was in the driveway of his home when Appellant Thomas was detained, handcuffed and frisked.

I. Government Intrusion by Entering Private Property

Officer Gemmill gave the following testimony [RR, 39 and 26 - 27]:

Question: Okay. And so -- because I'm unclear with the way you just answered. Are you certain that your lights were on at the time he got out of the vehicle?

Gemmill: I'm not certain. My focus -- my attention was on Mr. Thomas who was exiting the vehicle and I gave him orders to stop.

Question: Okay. Now, when you gave him -- and pulled up to him and gave him orders to stop, he was already walking, correct, on the driveway?

Gemmill: [H]e has to be, yes, ma'am, for the -- on the stop.

Question: Did you notice anything -- did you notice the defendant doing anything unusual while he -- after he stepped out of the vehicle and was walking up towards the residence?

Gemmill: I remember when he was walking towards the residence, he had a beer can in one of his hands. I approached him and I put the beer can on the ground...

Appellant Thomas gave the following testimony [RR, 78 -82]

Question: Now, eventually Mr. Bradshaw made that right turn.

Thomas: That's correct.

Question: And after he made that right turn, did you notice any light or sirens?

Thomas: No, ma'am.

Question: Did you notice any police cars?

Thomas: No police.

Question: Now, eventually you pulled up in front of your home, correct?

Thomas: That's correct.

Question: And at any time did you notice -- before you got out of the vehicle, did you notice any police cars?

Thomas: No, ma'am.

Question: Were there any sirens that you heard?

Thomas: Absolutely not.

Question: Were there any lights that you heard [sic]?

Thomas: No, ma'am.

Question: So, when you got out of your vehicle, can you, for the Court, tell us what you did?

Thomas: Once I exited the back passenger right side of the vehicle, I proceeded to walk up my driveway and throw away the empty carton. As I pulled the last beer out of the case, I threw away the beer case and opened my last beer before I went inside.

Question: Could you point to -- on the screen -- where you were standing at the time that you saw the police car stop in front of your home?

Thomas: I actually was in front of the truck throwing something away. And then I proceeded to walk right in front of the truck and opened my beer about right here. And that's when I was getting ready to walk towards my door. There's a little walkway right there. And that's about the place where they, you know, jumped out and told me whatever

they said. I'm not sure.

In making its findings, the trial court gave the following narrative: "This is where one of the controvers[ies] actually comes in or, I guess, the main one is whether the officer saw the defendant get out of the vehicle even though they had turned the lights on and/or whether or not the defendant was already out of the vehicle when they first saw -- or when he first [saw] the officer. I can see where both points of view could be perceived from each person, being the officer from the officer's point of view and the defendant's point of view at the time." [RR, 110].

In State v. Rendon, 477 S.W. 3d 805 (2015), this Court was asked to decide whether it constitutes a search within the meaning of the Fourth Amendment for law-enforcement officers to bring a trained drug-detection dog directly up to the front door of an apartment-home for the purpose of conducting a canine-narcotics sniff. This Court held that it does. Consistent with the reasoning of the Supreme Court's opinion in Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court concluded that the officers' use of a dog sniff at the front door of the apartment-home of Michael Eric Rendon, appellee, resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment.

The Fourth Amendment provides in relevant part that " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Court of Criminal Appeals referenced Jardines and noted the Supreme Court explained that the text of the Fourth Amendment establishes a simple baseline." Jardines, 133 S.Ct. at 1414. Namely, the Supreme Court indicated that, when " 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" Jardines (quoting United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 950 - 951, n. 3 (2012)). In particular, with respect to the special constitutional protections that attach to the home, the Supreme Court observed that, when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's " very core" stands " the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

II. Warrantless Search and Seizure Exceptions

A. Plain View Doctrine

The Court of Appeals concluded that Appellant Thomas was not illegally searched, and the first pill bottle containing Xanax was legally seized under the plain view doctrine. The lower court conceded that it was not immediately apparent that the first pill bottle Officer Gemmill removed from Appellant Thomas' pocket contained Xanax pills that were not prescribed to Appellant Thomas. (See Appendix - Court of Appeals Opinion) Still, the lower court found Officer Gemmill had probable cause to associate the pill bottle with contraband and criminal activity.

The lower court cited to McGaa v. State, No. 04-14-00052-CR, WL 5176652, 2014 *at 1, 3-4 (Tex. App. - San Antonio October 15, 2014, pet. ref'd). McGaa, and the instant case are distinguishable. McGaa was passed out in his vehicle with the motor running and a pill bottle between his legs when the police initially observed McGaa. In contrast, Appellant Thomas was in the driveway of his home, standing upright and alert, and Officer Gemmill discovered the pill bottle on Appellant Thomas' person, in Appellant Thomas' pocket. Further, the officer in McGaa called poison control to identify the pills McGaa possessed. Here, Officer Gemmill operated under pure assumption when determining that the pills Appellant

Thomas possessed were Xanax. The lower court also cited to Barron v. State, No. 08-99-00493-CR, 2001 WL 564266, at *4(Tex. App. - El Paso May 25, 2001, no pet.) and Lopez v. State, 223 S.W. 3d 408, 411, 417 (Tex. App. - Amarillo 2006, no pet.) to support its finding that Officer Gemmill legally seized the pill bottle containing Xanax from Appellant Thomas' pocket. Like, defendant McGaa, defendants Barron and Lopez were physically located in vehicles when pills were seized from those defendants. The officer in Barron retrieved the pill from the console of Barron's car. The officer in Lopez located the pills in a baggie that was protruding from the crease of the vehicle's gas cap. There is no nexus between the facts of Barron and Lopez and Appellant Thomas' case, because Appellant Thomas was in the driveway of his house where Appellant Thomas has the highest expectation of privacy. Further, after observing only the top of a pill bottle protruding from Appellant Thomas' pocket, Officer Gemmill reached into Appellant Thomas' pocket and removed a pill bottle, without it being immediately apparent that the pill bottle was incriminating.

The seizure of an object in plain view is justified if (1) the officer is lawfully where the object can be "plainly viewed, " (2) the "incriminating character" of the object is "immediately apparent, " and (3) the officer has the right to access the object. State v. Betts, 397 S.W.3d 198, 206 (Tex.

Crim. App. 2013). State v. Rendon, 477 S.W. 3d 805 (2015) would indicate that, in the instant case, Officer Gemmill was on Appellant Thomas' private property and not lawfully where the pills could be plainly viewed. After reviewing the testimony presented at the motion to suppress, the lower court believed that the incriminating character of the first pill bottle was not immediately apparent, because Officer Gemmill only saw the top of the pill bottle sticking out of Appellant Thomas' pocket. The first two (2) prongs of the plain view exception have not been met, which could, arguably, necessarily negate the third prong - Officer Gemmill had no right to even access Appellant Thomas' property, let alone the pills in Appellant Thomas' pocket.

B. Probable Cause

The lower Court concluded that Officer Gemmill did not illegally seize the second pill bottle, containing cocaine, from Appellant Thomas' pocket, because Officer Gemmill had probable cause to arrest Appellant Thomas after seizing the first pill bottle. Two (2) officers testified at the motion to suppress hearing - Officer Walker and Officer Gemmill. Neither officer could or did say that there was probable cause to search or arrest Appellant Thomas, prior to Officer Gemmill discovering the pill bottles in Appellant Thomas' pockets. Officer Walker, who was in an unmarked unit,

testified, "We called a marked unit to get the PC and stop the vehicle." [RR, 15] However, Officer Gemmill, who was in the marked unit, testified, " I was not told to find probable cause. I found probable cause whenever I was told the vehicle was leaving the known narcotics location, yes." [RR, 34]. Appellant Thomas was not the driver of the vehicle and did not commit a traffic violation. Officer Gemmill admitted that there were no facts that would lead Officer Gemmill to believe that there was probable cause to believe Appellant Thomas had committed any crime at the point Officer Gemmill handcuffed Appellant Thomas. (RR, 44).

Baldwin v. State, 278 S.W. 3d 367 (2009) addressed the issue of pat-down searches. In Baldwin, at the time he reached into appellant's pocket, Deputy Smith had the following information: (1) a woman he knew by sight was so concerned about an unknown man walking in the neighborhood that she called the police, (2) appellant fit the general description given by the woman, (3) appellant was dressed all in black, (4) appellant was looking into houses, but the officer had not ascertained from what vantage point this took place, (5) there had been several recent burglaries in the area, (6) the area was a " medium" crime neighborhood, (7) it was 10:30 at night, (8) upon seeing the deputy, appellant began to walk more quickly, (9) appellant was very nervous, glancing around, scanning the area, and refusing to make

eye contact with the deputy, and (10) appellant asked why he needed to present his identification. Without finding the necessity to decide whether Deputy Smith effectuated an arrest or an investigative detention, or whether reasonable suspicion existed to support an investigative detention, this Court found there was no valid basis for an arrest. This Court opined that had there been a valid basis for an investigative detention, there was no valid basis for reaching into appellant's pocket to procure his wallet. This Court concluded that these circumstances did not give rise to the relatively high level of suspicion that would constitute probable cause to arrest. Because Deputy Smith did not have probable cause to arrest at the time, reaching into appellant's pocket cannot be justified by the " search incident to arrest" doctrine. Id. at 370 -371.

A valid investigative detention can confer upon an officer the authority to pat down the suspect for weapons. Terry v. Ohio, 392 U.S 1, 29 (1968). Under the " plain feel" doctrine, an officer conducting a pat-down may seize an object " whose contour or mass makes its identity immediately apparent" as contraband. Minnesota v. Dickerson, 508 U.S. 366, 375 -376 (1993). But when the conditions of the " plain feel" doctrine (or the " plain view" doctrine) are not present, an officer conducting a valid investigative detention must have probable cause in order to conduct a search for non-

weapon contraband or other evidence. Arizona v. Hicks, 480 U.S. 321 (1987). For the same reason that Deputy Smith lacked probable cause to arrest, he also lacked probable cause to search for non-weapon contraband or other evidence. Consequently, the officer's conduct of reaching into appellant's pocket - even under a valid investigative detention - was an illegal search unless there existed some exception to the usual probable cause requirement. Baldwin v. State, 278 S.W. 3d 367, 372 (2009).

III. Conclusion

Proof of "a reasonable expectation of privacy" is at the forefront of all Fourth Amendment claims. Any defendant seeking to suppress evidence obtained in violation of the Fourth Amendment must first show that he personally had a reasonable expectation of privacy that the government invaded. Kothe v. State , 152 S.W. 3d 54, 59 (2004) quoting Rakas v. Illinois, 439 U.S. 128, 139 (1978). The Supreme Court states that Fourth Amendment "reasonableness" is measured "in objective terms by examining the totality of the circumstances"; it "eschew[s] bright-line rules, instead emphasizing the fact-specific nature of the ... inquiry." Ohio v. Robinette, 519 U.S. 33, 39 (1996). It requires a balance between the public interest served and the individual's right to be free from arbitrary detentions. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977). The lower court's

decision in this case allows law enforcement to enter an individual's private property, without a warrant, and conduct a search and seizure. This case merits review, because the lower court's decision disturbs the well-settled principle of the expectation of privacy this Court has set forth.

Prayer

Appellant Thomas prays this Court grant this Petition for Discretionary Review and, after full briefings and any oral argument granted, reverse the decision of The Court of Appeals to effect an outcome consistent with prior decisions of this Court.

Respectfully submitted,

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Certificate of Compliance

I certify that this document contains 3,109 words and is in compliance with Texas Rules of Appellate Procedure 9.4.

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Certificate of Service

I certify that a true and correct copy of this document was served on the following parties, via electronic filing and in accordance with the Texas Rules of Appellate Procedure:

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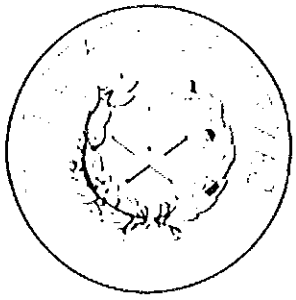
APPENDIX

Affirmed and Memorandum Opinion filed June 8, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00230-CR

KEITHRICK THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1454620

MEMORANDUM OPINION

Appellant Keithrick Thomas pleaded guilty to possession of cocaine, and the trial court sentenced him to two years' confinement. Appellant contends the trial court erroneously denied his motion to suppress. We affirm because appellant was justifiably detained incident to a traffic stop, a pill bottle containing Xanax was in plain view and lawfully seized, and appellant's further search that uncovered cocaine in a second pill bottle constituted a lawful search incident to arrest.

BACKGROUND

Appellant was indicted for possession of a controlled substance, namely cocaine, weighing more than one gram and less than four grams. Appellant filed a motion to suppress and the trial court held a hearing on his motion on February 23, 2016.

At the hearing, Houston Police Officer Rohan Walker testified that he was part of a tactical unit conducting surveillance of a house located on 4306 Trafalgar Street on January 15, 2015. Narcotics previously had been recovered from that house. Officer Walker testified that he observed a car driving up to the house, appellant exiting the passenger side of the car, appellant walking into the garage of the house, appellant coming out of the garage just a short time later, appellant getting back into the passenger side of the car, and the car driving off.

After appellant exited the house and got back into the car, Officer Walker called police officers in a marked unit and provided a description of the car appellant was in so the police officers could "develop the P[robable] C[ause] to stop the vehicle." Officer Walker testified that, based on his training and experience, he "believed that there was some type of narcotics or illegal activity" because "it's a known dope house that we've gotten narcotics the same way before in the past." Officer Walker testified that he has in the past "arrested people that have gone into that house and come back out [a] short time later."

Houston Police Officer Elizabeth Gemmill testified that she was assigned to the tactical unit on January 15, 2015. The unit's assignment that day was to monitor "a known narcotics house that in the past was known to distribute narcotics;" the house was located on 4306 Trafalgar Street. Officer Gemmill testified: "[W]e've run the narcotics search warrant at that location before. We — we've also made several traffic stops of individuals that were seen going in and out

of that location on prior dates who were found in possession of controlled substances." Officer Gemmill testified that she and other officers had arrested individuals coming from the house for narcotics "for a few weeks before" January 15, 2015.

Officer Gemmill and her partner Officer Gilcrest, who were nearby in a marked car, were told by Officer Walker via radio that "there's a vehicle that parked in front of the house. The passenger, [appellant], stepped out of the vehicle. Went inside the garage. A short time later came out and got back in the vehicle and left the location." Officer Gemmill and Officer Gilcrest started following the car. They observed that its driver failed to use a turn signal when making a right turn. They caught up to the car "as it came to a stop in front of a house and initiated a traffic stop." The house was appellant's residence, but Officer Gemmill was unaware of that fact. Officer Gemmill testified that she and Officer Gilcrest pulled up behind the car, turned on the police car lights, and appellant exited the car and started walking in the driveway towards his residence. At that point, Officer Gemmill instructed appellant to stop walking; she told him to stop because she "wanted to detain — detain him as a result of a traffic stop."

According to Officer Gemmill, appellant turned around when she instructed him to stop. Appellant was holding a beer can in one of his hands, and he started "making movements toward his midsection area" — toward his waistband. Officer Gemmill ordered him to stop "for officer safety" reasons because appellant made "a furtive movement" and "[a] lot of times, the midsection is where people carry guns and any weapons or anything like that." Officer Gemmill testified: "I approached him and I put the beer can on the ground and detained him for officer safety since he made that furtive movement." Officer Gemmill stated that she detained appellant by placing him in handcuffs" because "I don't have to worry

about [appellant making] that movement again towards [his] waistband and me not being able to prevent that movement." She then frisked appellant. As she was handcuffing appellant, she noticed "[t]here was a pill bottle protruding from one of his pant pockets." She could see "in plain view" the cap of the pill bottle and a "little bit of the orange."

Based on her experience, Officer Gemmill thought that narcotics were in the prescription pill bottle she saw in appellant's pocket because "oftentimes people . . . carry their narcotics within pill bottles." Officer Gemmill removed the pill bottle from appellant's left front pant pocket, "saw that it did not have defendant's name on it and it had Xanax tablets inside of it." Officer Gemmill stated that, "[a]fter finding narcotics within that pill bottle in plain view, yes, after that I conducted a full search of his person." Officer Gemmill testified: "By finding that, it led me to believe that perhaps there may be more illegal narcotics on his person and I continue[d] my search to find another pill bottle that did not have his name on it with crack cocaine inside of it" in the front right pant pocket.

Officer Gemmill testified that she was the only one who approached appellant and interacted with him. During the traffic stop, Officer Gilcrest "approached the driver who was also making a furtive movement." Officer Gemmill also testified that it is "unusual for somebody to get out of the vehicle" when a traffic stop is made and that it generally leads her to believe that the person "want[s] to get away from" police. Officer Gemmill stated that, "when the traffic stop was conducted and [appellant] got out of the passenger seat," she believed appellant "wanted to get away" from her or the traffic stop.

Appellant also testified at the hearing. He stated that his girlfriend, Erica Fisher, drove him to a store on the morning of January 15, 2015, so he could buy a case of beer and then dropped him off at the house on 4306 Trafalgar Street.

Appellant testified that his friends Clifton and Charlie Johnson lived at the house and that he arrived at their house for a visit around 9:00 a.m. Appellant claimed that he spent the entire day at his friends' house playing video games, watching television, talking, and drinking beer. Appellant claimed that he called his father's friend John Bradshaw to pick him up at his friends' house between 3:00 and 4:00 p.m. When Bradshaw picked him up, appellant "entered the back passenger seat" of Bradshaw's car because the front seat was wet.

Appellant testified that he did not see a police car, see police car lights, or hear sirens when Bradshaw stopped in front of his house. Appellant testified that he exited the car after Bradshaw pulled in front of his house, walked up his driveway, pulled out the last beer can from a carton, went to the trash can to throw away the empty beer carton, opened up the beer can, and started walking towards his house. Appellant then noticed a police car turning the corner at a fast speed. Appellant testified that he did not "believe that as they were driving really fast that they were coming for" him or he "probably would have run."

Appellant testified that the police car stopped in front of his house as he was walking towards his front door. According to appellant, two police officers exited the police car. Officer Gemmill approached him, did not ask him any questions, immediately handcuffed his hands behind his back, and started searching his pockets. Appellant denied making a furtive movement or reaching for his midsection and claimed that he could not have reached for his midsection because he was holding a beer in his hand. Appellant also denied that any pill bottles were protruding from his pockets and claimed that the bottles were "completely concealed." Appellant admitted having a previous conviction for possession of cocaine and for possession of a firearm as a felon.

Appellant's friend, Clifton Johnson, also testified at the hearing. Clifton

testified that he resides in the house on 4306 Trafalgar Street. Clifton remembered appellant coming to his house around 9:00 a.m. on January 15, 2015. He confirmed that appellant spent the day at his house playing video games, watching television, and drinking beer until appellant left around 3:30 or 4:00 p.m. Clifton admitted having a previous conviction for possession of a controlled substance, for tampering with evidence, and for theft.

Clifton's 85-year-old grandfather, Charlie Johnson, testified at the hearing. Charlie stated that he remembered January 15, 2015 "very, very, very vaguely" because his memory was not as good as it used to be. Charlie stated that appellant was always at his house on 4306 Trafalgar Street, but Charlie "couldn't say" how long appellant was at his house on January 15, 2015. Charlie stated that he "imagin[ed]" appellant spent "[p]robably all day" at his house. Charlie admitted that the police had executed a search warrant at his house "one day last year" and that the police arrested his son for drug possession. Charlie could not remember if the police executed another search warrant at his house at some other time in the past.

After the hearing, the trial court denied appellant's motion to suppress on February 23, 2016. Appellant pleaded guilty to possession of a controlled substance, namely cocaine, weighing more than one gram and less than four grams. Appellant was sentenced to two years' confinement. The trial court later entered findings of fact and conclusions of law on May 18, 2016. Appellant filed a timely notice of appeal.

ANALYSIS

Appellant argues in his sole issue that the trial court erroneously denied his motion to suppress because (1) appellant's initial detention was unlawful; (2) appellant's detention "was not temporary and was overly intrusive;" (3) Officer

Gemmill unlawfully seized the first pill bottle containing Xanax from appellant's pocket; and (4) Officer Gemmill unlawfully searched appellant's person and seized from another pocket a second pill bottle containing cocaine.

I. Standard of Review

We review a trial judge's ruling on a motion to suppress under a bifurcated standard of review. *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016). First, we afford almost total deference to a trial judge's determination of historical facts. *Id.* The judge is the sole trier of fact and judge of witnesses' credibility and the weight to be given their testimony. *Id.* The judge is entitled to believe or disbelieve all or part of a witness's testimony — even if that testimony is uncontroverted — because the judge can observe the witness's demeanor and appearance. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

When the trial judge makes express findings of fact, we afford those findings almost total deference as long as the record supports them. *State v. Castleberry*, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011). "Therefore, the prevailing party is entitled to 'the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence.'" *Id.* (quoting *State v. Garcia–Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)).

Second, we review a judge's application of the law to the facts *de novo*. *Weems*, 493 S.W.3d at 577. We will sustain the judge's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case. *Id.*

II. Traffic Stop

We begin our analysis by addressing appellant's contention that his initial detention was unlawful because the traffic stop of the vehicle in which he was a

passenger was "not at all random" and "[f]rom the inception, Officer Gemmill's sole, deliberate purpose was to search Appellant Thomas and seize any contraband [he] may have possessed."

A violation of a traffic law is sufficient authority for an officer to stop a vehicle. *Josey v. State*, 981 S.W.2d 831, 837 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Thus, if an officer has a reasonable basis for suspecting a person has committed a traffic offense, the officer legally may initiate a traffic stop. *Miller v. State*, 418 S.W.3d 692, 696 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd.). A lawful traffic stop is ordinarily a temporary and reasonable detention of the driver and passengers. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Josey*, 981 S.W.2d at 837.

An objectively valid traffic stop is not unlawful just because the detaining officer has some ulterior motive for making the stop. *Kelly v. State*, 331 S.W.3d 541, 549 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Nor can an officer's stated purpose for a stop either validate an illegal stop or invalidate a legal stop because its legality rests on the totality of the circumstances viewed objectively. *Miller*, 418 S.W.3d at 696.

Texas Transportation Code section 545.104 states that an operator (1) "shall use the signal authorized . . . to indicate an intention to turn, change lanes, or start from a parked position;" or (2) "intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn." Tex. Transp. Code Ann. § 545.104(a), (b) (Vernon 2011). Officer Gemmill testified that she observed Bradshaw commit a traffic violation when he failed to "use his turn signal when he made a right turn." Appellant also acknowledged in his brief: "The driver of the vehicle failed to used [sic] his turn signal to indicate a right turn."

Because appellant was a passenger in a vehicle lawfully detained for a traffic violation, Officer Gemmill was justified in also detaining appellant for investigative purposes. *Josey*, 981 S.W.2d at 838; *see also Johnson*, 555 U.S. at 333. We reject appellant's contention that his detention was unlawful from its inception; we conclude that appellant was lawfully detained following a lawful traffic stop.

II. Detention

We next address appellant's argument that his detention incident to the traffic stop "was not temporary and was overly intrusive."

A. Overly Intrusive Detention

Appellant contends that his detention was "overly intrusive" for two reasons. First, Officer Gemmill "was unlawfully on Appellant Thomas's property" and "physically intruded into the curtilage that exceeded the scope of any express or implied license." Second, appellant should not have been handcuffed "for officer safety" when he "did not continue to make the 'furtive' movement" and "Officer Gemmill testified that Appellant Thomas had complied with all [of] Officer Gemmill's orders and Officer Gemmill was not in fear for her safety."

Appellant's assertion that Officer Gemmill was unlawfully on his property and "intruded into the curtilage," more specifically appellant's driveway, is incorrect. Because appellant was a passenger in a vehicle lawfully detained for a traffic violation, Officer Gemmill was justified in also detaining appellant for investigative purposes. *Josey*, 981 S.W.2d at 838; *see also Johnson*, 555 U.S. at 333. The fact that appellant chose to not remain in the vehicle when police officers initiated a lawful traffic stop but exited the vehicle and began walking in his driveway does not transform his lawful detention into an unlawful intrusion into

the curtilage or appellant's property. *See Davis v. State*, 905 S.W.2d 655, 661-62 (Tex. App.—Texarkana 1995, pet. ref'd).

We also reject appellant's contention that his detention was overly intrusive because Officer Gemmill handcuffed him after he complied with Officer Gemmill's order and stopped making any furtive movement, and Officer Gemmill was not in fear for her safety.

During an investigatory stop, a police officer may use such force as is reasonably necessary to effect the goal of the detention: investigation, maintenance of the status quo, or officer safety. *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997); *Chambers v. State*, 397 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). A court must determine reasonableness from a reasonable police officer's perspective at the scene, making allowances for the fact that officers must often make quick decisions under tense, uncertain, and rapidly changing circumstances. *Chambers*, 397 S.W.3d at 782. Thus, the handcuffing of a vehicle's occupants may be appropriate under certain circumstances to effectuate officer safety or thwart an attempt to frustrate further inquiry. *Hill v. State*, 303 S.W.3d 863, 872 (Tex. App.—Fort Worth 2009, pet. ref'd); *see State v. Sheppard*, 271 S.W.3d 281, 289 (Tex. Crim. App. 2008).

At the motion to suppress hearing, Officer Gemmill testified that appellant immediately exited the car after the traffic stop was initiated. Officer Gemmill instructed appellant to stop walking away because she wanted to "detain him as a result of a traffic stop." She testified that it is "unusual for somebody to get out of the vehicle" when a traffic stop is initiated and that it generally leads her to believe that the person "want[s] to get away from" police. When Officer Gemmill instructed appellant to stop, he turned around and started "making movements toward his midsection area" — toward his waistband. Officer Gemmill testified

that she ordered appellant to stop "for officer safety" reasons because appellant made "a furtive movement" and "[a] lot of times, the midsection is where people carry guns and any weapons or anything like that."

Contrary to appellant's contention, Officer Gemmill did not testify that she was not in fear for her safety, and there is no evidence in the record to indicate that "Officer Gemmill was not in fear for her safety." Nor is the fact that appellant "did not continue to make the 'furtive' movement" and "complied with all [of] Officer Gemmill's orders" evidence that Officer Gemmill was safe and that appellant would not have again attempted to reach for his waistband to potentially access a weapon and attack Officer Gemmill had she not handcuffed him.

Officer Gemmill testified that she detained appellant by handcuffing him "for officer safety since he made that furtive movement," and because "I don't have to worry about [appellant] make that movement again towards [his] waistband and me not being able to prevent that movement." Additionally, Officer Gemmill did not have any backup help because her partner, Officer Gilcrest, was occupied with the vehicle's driver, Bradshaw, "who was also making a furtive movement" during the traffic stop.

Based on the record before us, we conclude that Officer Gemmill used force reasonably necessary to effect the goal of the detention, namely to assure officer safety, maintain the status quo, and conduct the investigation of a traffic violation. *See Rhodes*, 945 S.W.2d at 117. Officer Gemmill was justified in handcuffing appellant to effectively provide for her and her partner's safety while they attempted to investigate the traffic violation they observed before initiating the traffic stop. *See Chambers*, 397 S.W.3d at 781-82 ("[A]lthough [Officer] Sanchez used a weapon and handcuffs to detain Chambers, this amount of force was reasonable under the circumstances. [Officer] Sanchez was on heightened alert

while his partner was preoccupied with another suspect when he saw Chambers reach for what [Officer] Sanchez suspected may have been a weapon. . . . The handcuffs were therefore used to ensure [Officer] Sanchez's safety during his investigation, which is particularly reasonable given that [Officer] Sutton was not available to assist him at the time."); *Hill*, 303 S.W.3d at 872 (holding that police officer was justified in handcuffing appellant for officer safety while attempting to investigate traffic violation when evidence showed that, as officers conducted a stop for traffic violations, appellant and the front passenger acted out of the ordinary by opening the doors and immediately exiting the vehicle and appellant reaching towards his shirt as he was exiting the vehicle); *see also Rivas v. State*, No. 04-14-00037-CR, 2014 WL 7339364, *1-3 (Tex. App.—San Antonio Dec. 23, 2014, no pet.) (mem. op., not designated for publication) (holding that police officer was justified in handcuffing appellant for officer safety when the officer stopped a vehicle for a traffic violation, and appellant, who was a passenger in the vehicle, exited the vehicle, opened the trunk, and started searching in the trunk).

Accordingly, we conclude that appellant's detention was not "overly intrusive."

B. Temporary Detention

We now turn to appellant's assertion that his detention was not temporary because, "[o]nce the traffic matter was disposed of, the detention should have ended at that point."

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation." *Johnson*, 555 U.S. at 333. Following a lawful stop, police may lawfully detain the driver and all passengers "pending inquiry into a vehicular violation." *Id.* at 327, 333. The temporary seizure of the driver and passengers is reasonable and ordinarily remains reasonable for the duration of the

stop, which "ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Id.* at 333. Once the traffic stop investigation is concluded, the police officer may no longer detain the driver and passengers, who must be permitted to leave. *See Kothe v. State*, 152 S.W.3d 54, 63-64 (Tex. Crim. App. 2004). However, if an officer develops reasonable suspicion during a valid traffic stop and detention that the detainee is engaged in criminal activity, prolonged or continued detention is justified. *Richardson v. State*, 402 S.W.3d 272, 277 (Tex. App.—Fort Worth 2013, pet. ref'd); *see Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Appellant seems to argue that his detention was not temporary because the investigation of the traffic violation had concluded and the traffic stop had ended at the time appellant was told to stop walking in the driveway and was handcuffed. The evidence in the record does not support his argument. Instead, the evidence shows that the investigatory stop had just begun when Officer Gemmill stopped and handcuffed appellant. Thus, the traffic stop was in progress and had not concluded. Nor had the investigatory stop ended when Officer Gemmill "discovered the pill bottles immediately after Officer Gemmill detained Appellant Thomas."

Accordingly, we reject appellant's argument that his detention was not temporary because he was detained "once the traffic matter was disposed of."

III. Plain View Doctrine

We now turn to appellant's argument challenging the seizure of the first pill bottle containing Xanax as being unjustified under the plain view doctrine. Appellant contends that Officer Gemmill illegally searched him and "discovered the pill bottle" immediately after she detained him. Appellant contends that the

seizure of the first pill bottle containing Xanax was not justified because the "incriminating character of the pill bottle was not immediately apparent to Officer Gemmill" as required by the plain view doctrine.

The Fourth Amendment protects against unreasonable searches and seizures. *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). "The capacity to claim the protection of the Fourth Amendment depends upon whether the person has a legitimate expectation of privacy in the invaded place." *Id.* at 541. A warrantless search of either a person or property is considered per se unreasonable subject to well established exceptions to the warrant requirement. *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). Although commonly classified as an exception to the warrant requirement, the plain view doctrine is not truly an exception because the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *Walter*, 28 S.W.3d at 541.

Thus, if an item is in plain view, neither its observation nor its seizure involves any invasion of privacy. *Id.* The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment. *See Illinois v. Andreas*, 463 U.S. 765, 771 (1983). A seizure of an object is lawful under the plain view doctrine if three requirements are met. *Keehn v. State*, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009). First, police officers must lawfully be where the object can be "plainly viewed." *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013) (citing *Keehn*, 279 S.W.3d at 335). Second, the "incriminating character" of the object in plain view must be "immediately apparent" to the police officers. *Id.* Third, the officials must have the right to access the object. *Id.*

Appellant challenges only the second prong. This immediacy prong requires merely a showing of probable cause that the item discovered is incriminating evidence; actual knowledge of the incriminating evidence is not required. *Goonan v. State*, 334 S.W.3d 357, 361 (Tex. App.—Fort Worth 2011, no pet.) (citing *Joseph v. State*, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991)); *see State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010). Probable cause exists when the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). Known facts and circumstances include those personally known to police officers or those derived from a "reasonably trustworthy" source. *Id.* An officer also may rely on training and experience to draw inferences and make deductions as to the nature of the item seen. *Nichols v. State*, 886 S.W.2d 324, 325-26 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Here, Officer Gemmill testified that she was assigned to monitor "a known narcotics house that in the past was known to distribute narcotics." She testified that she and other officers had executed a narcotics search warrant at that house before and had arrested individuals for narcotics coming from that house "for a few weeks before." She stated that she and other officers "also made several traffic stops of individuals that were seen going in and out of that location on prior dates who were found in possession of controlled substances."

Officer Gemmill testified that Officer Walker had informed her by radio that there was "a vehicle that parked in front of the house. The passenger, [appellant], stepped out of the vehicle. Went inside the garage. A short time later came out and got back in the vehicle and left the location." When Officer Gemmill and her partner initiated a traffic stop, appellant immediately exited the car, leading her to

believe appellant wanted to "get away." Because appellant made movements towards his waistband, Officer Gemmill handcuffed him and observed "in plain view" a "pill bottle protruding from one of his pant pockets."

Based on her experience, Officer Gemmill knew that individuals often "carry their narcotics within pill bottles" and without a label or name on it. Officer Gemmill testified that she removed the pill bottle she saw "sticking out" of appellant's pocket and immediately saw it did not have appellant's name on it "and it had Xanax tablets inside of it." It is undisputed that Xanax is a controlled substance. *$132,265.00 in U.S. Currency v. State*, 409 S.W.3d 17, 24 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see* Tex. Health & Safety Code Ann. §§ 481.002(5), 481.104(a) (Vernon Supp. 2016); *Gibson v. State*, 233 S.W.3d 447, 450 (Tex. App.—Waco 2007, no pet.) (Xanax is alprazolam). And as a controlled substance, it is illegal to possess Xanax without a valid prescription. *See Glenn v. State*, 475 S.W.3d 530, 539 (Tex. App.—Texarkana 2015, no pet.).

Although it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to appellant, Officer Gemmill did have probable cause to associate the pill bottle with contraband and criminal activity. Based on the evidence in the record, Officer Gemmill presented sufficient facts and circumstances demonstrating her belief that the pill bottle she saw in plain view was of "incriminating character." *See McGaa v. State*, No. 04-14-00052-CR, 2014 WL 5176652, *at 1, 3-4 (Tex. App.—San Antonio Oct. 15, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that second prong of plain view doctrine was met; even though it was not immediately apparent that the pills police officer seized were not prescribed to appellant, the court held that officer had "probable cause to associate the pill bottle with criminal activity" based on testimony that (1) he was notified that "a suspicious person" was passed out in a

vehicle; (2) he arrived at the scene and observed appellant seemingly asleep in the driver's seat with the motor running; (3) when appellant did not react to his knocking on the passenger-side window, he looked inside the car and observed a pill bottle with the cap on between appellant's legs; (4) "since the pill bottle was in plain view, he grabbed it, put it on top of the car, turned the engine off, put the keys on top of the car, and then started talking to the driver;" (5) he requested appellant's identification, checked the pill bottle, and discovered appellant's identification did not match the prescription label on the pill bottle; (6) he "called poison control to identify the pills;" and (7) arrested appellant for possession of a controlled substance); *Barron v. State*, No. 08-99-00493-CR, 2001 WL 564266, at *4 (Tex. App.—El Paso May 25, 2001, no pet.) (not designated for publication) (holding that second prong of plain view doctrine was met; although officer admitted that it was not immediately apparent to him that the white pill in plain view inside vehicle on console was an illegal substance, his suspicion of such, his later examination of the pill and determination that the pill was an illegal substance, the reckless driving, and the occupants' denial of being on medication provided sufficient probable cause); *see also Lopez v. State*, 223 S.W.3d 408, 411, 417 (Tex. App.—Amarillo 2006, no pet.) (noting "that certain objects not inherently suspicious can become so under certain circumstances" and "can provide probable cause to invoke the plain view doctrine;" holding that police officer "had probable cause to believe the plastic baggie presented evidence of a crime sufficient to satisfy the immediately apparent prong" of the plain view doctrine based on evidence that (1) appellant was stopped in a high crime area; (2) officer "observed a 'tiny bit' of a plastic baggie in the crease around the gas cap compartment located on the rear driver's side; and (3) officer, "in his experience, could conceive of no other reason for a plastic baggie to be visible in the crease of the gas cap compartment other than to conceal narcotics").

We conclude that appellant was not illegally searched, and the pill bottle containing Xanax was legally seized under the plain view doctrine. No Fourth Amendment violation occurred because Officer Gemmill did not search appellant and was justified in seizing the Xanax pill bottle pursuant to the plain view doctrine.

IV. Search Incident to Arrest

Finally, we address appellant's argument that Officer Gemmill "unreasonably searched [him] and illegally seized" a second pill bottle containing cocaine from his pocket after discovering and seizing the first pill bottle containing Xanax. The State counters that appellant's warrantless search was reasonable as a search incident to arrest.

"Pursuant to the Fourth Amendment, a warrantless search of either a person or property is considered per se unreasonable subject to a 'few specifically defined and well established exceptions.'" *McGee*, 105 S.W.3d at 615 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). Those exceptions include voluntary consent to search, search under exigent circumstances, and search incident to arrest. *Id.*; *Perez v. State*, 495 S.W.3d 374, 385 (Tex. App.—Houston [14th Dist.] 2016, no pet.). It is the State's burden to show that the search falls within one of these exceptions. *McGee*, 105 S.W.3d at 615; *Perez*, 495 S.W.3d at 385.

Thus, under the Fourth Amendment, police officers may search an arrestee incident to a lawful arrest. *State v. Granville*, 423 S.W.3d 399, 410 (Tex. Crim. App. 2014). The justification for permitting such a warrantless search is the need (1) "for officers to seize weapons or other things which might be used to assault on officer or effect an escape;" and (2) "to prevent the loss or destruction of evidence." *Id.* Officers are permitted to search a defendant, or areas within the defendant's immediate control, to prevent the concealment or destruction of

evidence; this includes searching in and removing property from a defendant's pockets. *Meiburg v. State*, 473 S.W.3d 917, 922 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

It is irrelevant whether the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search. *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999); *Glenn*, 475 S.W.3d at 540; *Meiburg*, 473 S.W.3d at 922; *Branch v. State*, 335 S.W.3d 893, 901 (Tex. App.—Austin 2011, pet. ref'd). Probable cause justifying an arrest requires the officer to have a reasonable belief that, based on the facts and circumstances within the officer's personal knowledge or of which the officer has reasonably trustworthy information, an offense has been committed. *See Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005); *Smith v. State*, 491 S.W.3d 864, 870 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

As we have discussed above, Officer Gemmill legally seized the first pill bottle containing Xanax. Xanax is a controlled substance. *$132,265.00 in U.S. Currency*, 409 S.W.3d at 24; *see* Tex. Health & Safety Code Ann. §§ 481.002(5), 481.104(a). Because Xanax is a controlled substance, it is illegal to possess Xanax without a valid prescription. *See Glenn*, 475 S.W.3d at 539. Appellant did not have a valid prescription for the Xanax contained in the unlabeled pill bottle Officer Gemmill seized, and Officer Gemmill had probable cause to arrest appellant for possession of the controlled substance. *See id.* at 540-41.

Given that Officer Gemmill had probable cause to arrest appellant, she was also permitted to conduct a search of appellant incident to that arrest, and her reaching into appellant's pocket for the second pill bottle containing cocaine qualified as a search incident to arrest. *See Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009); *Branch*, 335 S.W.3d at 901. It is irrelevant that

appellant's arrest had not occurred before the search because probable cause to arrest was established before the search was conducted; thus, the search of appellant's person was a lawful search incident to arrest. *See Ballard*, 987 S.W.2d at 892; *Glenn*, 475 S.W.3d at 540; *Branch*, 335 S.W.3d at 901.

We conclude that Officer Gemmill did not unreasonably search appellant and illegally seize the second pill bottle containing cocaine from his pocket. Accordingly, the trial court did not err in denying appellant's motion to suppress. We overrule appellant's sole issue.

CONCLUSION

Having overruled appellant's sole issue, we affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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